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No. 94-1859

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

DAVID LEE POWELL,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a petitioner is constitutionally entitled to a new trial on guilt-innocence on the basis of alleged errors occurring solely during the punishment phase of his bifurcated capital murder trial.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through the Attorney General of Texas, and files this Brief in Opposition.

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[1] For clarity, Respondent will be referred to as "the state" and Petitioner David Lee Powell as "Powell."

OPINION BELOW

The Court of Criminal Appeals affirmed Powell's conviction but vacated and remanded his death sentence for further proceedings consistent with that court's opinion. *Powell v. State*, 897 S.W.2d 307 (Tex. Crim. App. 1994).

JURISDICTION

Powell seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Powell bases his claims upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

By a reindictment[2] on April 4, 1991, in the 167th District Court of Travis County, Powell was charged with the capital murder of Ralph Ablanedo, a police officer acting in the lawful discharge of an official duty. Powell was tried by a jury, which on November 6, 1991, found him guilty as charged in the indictment. On November 15, 1991, following a separate

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[2] Powell was tried and convicted for the same offense and sentenced to death in 1978. The Court of Criminal Appeals affirmed the conviction. *Powell v. State*, 742 S.W.2d 353 (Tex. Crim. App. 1987). On petition for writ of certiorari, this Court vacated and remanded for further consideration. *Powell v. Texas*, 487 U.S. 1230 (1988). On remand the Court of Criminal Appeals again affirmed, *Powell v. Texas*, 767 S.W. 2d 759 (Tex. Crim. App. 1989), and this Court again granted Powell's petition for writ of certiorari. In *Powell v. Texas*, 492 U.S. 680 (1989), this Court reversed the judgment of the Court of Criminal Appeals. Subsequently, Powell was retried; that retrial is the subject of the instant petition for writ of certiorari.

punishment hearing, the jury answered affirmatively two special sentencing issues,[3] and the trial court imposed the death sentence.

Powell's conviction and death sentence were automatically appealed to the Texas Court of Criminal Appeals, which on December 7, 1994, affirmed the conviction but vacated the death sentence and remanded for a new sentencing hearing. *Powell v. State*, 897 S.W.2d 307 (Tex. Crim. App. 1994). The state filed a motion for rehearing, which was denied on February 15, 1995. These proceedings followed.

B. Statement of Facts

1. Guilt-Innocence Phase

In the early morning hours of May 18, 1978, Sheila Meinert, a friend of Powell's, was driving Powell to south Austin in Powell's red Ford Mustang at his request. 24 SR 116-18.[4] Powell was very upset. 24 SR 117. Powell had a machine gun in the back seat of the car, as well as a live hand grenade, some other guns, ammunition, handcuffs, books about weapons, radical political literature, a knapsack containing approximately $6,000 of distributable methamphetamine, a flyer consisting of a price sheet for selling methamphetamine, and other written notes or "tally sheets" containing names of buyers

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[3] Instead of submitting to the jury the special issues in effect at the time of Powell's offense, the trial court replaced the "deliberateness" special issue with an "anti-parties" special issue which was the product of then recent amendments to article 37.071 of the Texas Code of Criminal Procedure. On appeal, the Court of Criminal Appeals concluded that the trial court's actions were contrary to legislative mandate because the amended portions of the code dealing with the special issues applied only to offenses committed on or after September 1, 1991. It is on this basis that the court remanded Powell's case for a new sentencing hearing. *Powell v. State*, 897 S.W. 2d at 317.

[4] "SR" refers to the statement of facts from Powell's trial, preceded by volume number and followed by page number. "Tr." refers to the transcript of Powell's trial.

and calculations of profits. 24 SR 130; 25 SR 228-262; 26 SR 610-13; 28 SR 864-69.

Ralph Ablanedo, a police officer in a marked patrol car, stopped Meinert and Powell on Live Oak Street in Austin. 24 SR 119. Meinert got out of the car and approached Officer Ablanedo, who asked to see her driver's license. 24 SR 119. Meinert responded that she had lost her license at which time the officer asked to see Powell's driver's license. 24 SR 120-21. Officer Ablanedo attempted to run a computer check on Powell's license but the dispatcher informed him that the computers were down. 26 SR 524-25. Officer Ablanedo issued Meinert a citation and allowed her and Powell to proceed. 24 SR 124.

Immediately after Meinert and Powell drove off, the dispatcher notified Officer Ablanedo that there was a possible misdemeanor theft warrant on Powell. 26 SR 527. Officer Ablanedo again stopped Meinert and Powell, and Meinert again got out of the Mustang to approach the officer. 24 SR 124-25. Suddenly Meinert heard a "deafening noise," which she later learned were gunshots. 24 SR 125, 128. Meinert ran back to the Mustang and "started driving hysterically." 24 SR 128. At trial, Meinert testified that she was surprised that Powell would do something like shoot a police officer. 24 SR 158-59. However, she testified that Powell used drugs and that his behavior had become progressively more "extreme." 24 SR 159.

Bobby Bullard was driving by at the time of the murder and testified that he saw a police car and a Mustang stopped on the side of the road. 25 SR 359. The policeman got out of his car and was walking between the two cars when Bullard heard two to four shots and saw the policeman go down. 25 SR 359-61. The officer attempted to stand up but was immediately shot again by an automatic weapon. 25 SR 361. Bullard saw a man between the two front seats of the Mustang shooting through the side and back of the car with a rifle. 25 SR 363. Bullard identified Powell as the man he saw in the Mustang. 25 SR 367. Bullard also thought he saw a portion of someone else's head under the steering wheel of the Mustang. 35 SR 393. Bullard

went to help Officer Ablanedo and heard him say, "The damn girl." 25 SR 380.

Immediately after this shooting, Meinert drove to a nearby parking lot, stopped the car, and Powell exchanged gunfire with more police officers at this location. 24 SR 132-33. Powell gave Meinert the hand grenade and told her to unwrap the tape around it. 24 SR 133-34. She gave the grenade back to Powell but did not recall what he did with it. 24 SR 134. Officer Joe Villegas was the first police officer on the scene of the second shooting and testified that he immediately came under heavy fire after pulling into the parking lot. 27 SR 731. A white female then exited the Mustang screaming with her hands up. 27 SR 733. Officer Villegas yelled at her to lay down in the middle of the asphalt. 27 SR 733.[5] Officer Villegas saw a white male running towards Oltorf Street. 27 SR 733. He shot at the man but missed, and then lost track of him. 27 SR 733-34. Officer Villegas found a hand grenade lying about ten to fifteen feet from his squad car. 27 SR 735. Powell was later found hiding under some bushes at the nearby Travis High School. 25 SR 313. When Officer Villegas saw Powell at the police station, he knew Powell and recognized him as the person who had shot at him. 27 SR 736.

Officer Bruce Mills testified that he arrived at the first scene after Officer Ablanedo had been shot and that Officer Ablanedo told him "that a girl and a guy were in the car, and that they were armed with a shotgun or a machine gun is what he said, and then he said, 'He got me with the shotgun.'" 29 SR 1082. Officer Ablanedo died as a result of multiple gunshot injuries. 26 SR 640.

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[5] Meinert was arrested and taken to jail. 27 SR 733. She was later convicted of the attempted capital murder of Officer Villegas. 24 SR 135-36.

2. Punishment Phase

State's Evidence

Fred Ligarde, an FBI agent at the time of the murder, testified that on May 19, 1978, Powell and his attorney gave consent to search Powell's residence. 31 SR 4-5. Inside the house were a black cylinder containing a hand grenade, some small vials of methamphetamine, some .45 caliber ammunition and 7.62 Russian ammunition, reloading dice, various chemicals and lab equipment for manufacturing methamphetamine, and military manuals on military tactics and the operation of machine guns and other weapons which are issued by the United States government. 31 SR 16, 22, 26.

James Walsh, a police officer, knew Powell prior to the murder and stated he had a bad reputation in the community for being a peaceable and law-abiding citizen. 31 SR 41-2.

Dr. Clay Griffith, a psychiatrist who did not examine Powell, testified on the basis of a hypothetical that Powell posed a continuing threat to society. 31 SR 82. Dr. Griffith further testified that, although the use of methamphetamines may affect a person's personality, it does not cause a person to kill. 31 SR 83-4. On cross-examination, Dr. Griffith testified that a person can develop a psychosis from abusing methamphetamines. 31 SR 103. However, on redirect, Dr. Griffith testified that even assuming such a psychosis, it did not change his opinion that Powell was a future danger. 31 SR 106.

Defense Evidence

Bill Powell, Powell's father, testified that his son did very well in school, had a lot of friends and was an "exceptionally good child" who never had any behavioral problems growing up. 32 SR 122-28. Powell was valedictorian of his high school class and was accepted into the honors program at the University of Texas. 32 SR 129-32. However, after going to college, Powell's political views began to cause problems with his parents and they eventually lost all contact with him for a few

years. 32 SR 132-33. In 1977, Bill Powell saw his son in Dallas and he appeared thin, haggard and disheveled. Bill Powell testified that Powell would not be a future threat to society. 32 SR 141. He stated on cross-examination that Powell had never admitted to him that he committed the murder. 32 SR 142.

Frida Malone, Powell's aunt, testified that Powell always had a very nice personality and was interested in many different things as a child. 32 SR 154-55. However, the last time she saw him before the murder in 1977, he looked "extremely abnormal". 32 SR 158. Malone suggested to Powell's mother that Powell see a psychiatrist but that same night Powell disappeared from his parents' house in the middle of the night. 32 SR 159-60. Malone testified that Powell could do a lot of good for the world because of his intelligence and that she loved Powell very much. 32 SR 179-80.

Dr. Lester Grinspoon, a psychiatrist, testified that amphetamine use can lead to psychosis, meaning that the person "loses touch with reality," and some of the manifestations may be "bizarre behavior, poor judgment, hacullinations [sic], allusions, that sort of thing." 32 SR 197-99. He further testified that anyone who uses tremendous amounts of methamphetamine, regardless of his personality, will become aggressive and dangerous and that taking enough of the drug will cause a paranoid psychosis. 32 SR 209. Finally, he testified that a psychiatrist cannot predict future dangerousness. 32 SR 210-11.

Dr. John Luker testified that Powell sought help from him in 1977 for his methamphetamine dependency and that he treated Powell by prescribing cyclert, a central nervous system stimulant, as a substitute drug. 32 SR 241-43. He stopped seeing Powell in December of 1977, and that was also the last time he prescribed cyclert for Powell. 32 SR 246. Powell had not stopped using drugs at that time. 32 SR 246. Dr. Luker testified he was a recovering addict himself. 32 SR 248.

George Wheat, a clinical psychologist with the Texas Department of Corrections ("TDC") testified that Powell was selected for the work capable program in TDC which selects only those inmates considered not to be dangerous. 32 SR 252-

57. Wheat testified that Powell was helpful to other inmates, teaching them to read and write. 32 SR 262. On cross-examination, Wheat testified Powell had had some minor disciplinary infractions in prison for refusing to obey certain rules and orders. 32 SR 265-68.

Helen Wallace, a licensed vocational nurse at TDC, testified as to Powell's good character and stated she did not feel he would pose a future threat to society. 32 SR 272-92. Ron Hampton, a police officer from Washington, D.C., who is involved in numerous community help programs, testified that Powell had arranged some speaking engagements for him in Austin and that it would be a waste to execute Powell because he had a lot to offer society. 32 SR 317-20. Donnette Moss, an advisor within the Plan II Honors Program at the University of Texas, testified that when Powell entered college he was a sweet-natured person and was concerned about the well-being of others. 32 SR 337. Powell scored an almost perfect score on the SAT college entrance exams. 32 SR 338. Moss testified that Powell should not be executed and was of use to society. 32 SR 343. David Van Os, an attorney who met Powell in the Honors II program at UT, testified that when he first met Powell, Powell was a kind person whom anybody would be glad to have for a friend. 33 SR 353-54. He stated that Powell has a lot to offer society. 33 SR 360.[6]

Dr. Richard Psikoff, a psychiatrist who had examined Powell, testified about Powell's past and his family history of mental illness and depression. 33 SR 394-400. He testified that after Powell went to college he became depressed and turned to drugs. 33 SR 401-05, 412, 437. Dr. Psikoff testified that in July of 1977 Powell went to Dr. Luker for help with his drug problem. 33 SR 425-26. He stated that Dr. Luker's incompetent use of cyclert to treat Powell only exasperated the problem because Powell was using the cyclert in conjunction

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[6] Other witnesses that testified in favor of Powell's good character were Sissy Farenthold, 33 SR 539; Clarence Brandeley, 33 SR 547; John Wheat, 33 SR 565.

with the methamphetamines instead of as a substitute for them. 33 SR 426-32, 36. He testified that

> Between July and December, David starts to believe we're into World War III. We have an invasion coming. Remember, we said you can go crazy on this stuff. David buys machine guns. He buys hand grenades. . . . He gets so paranoid he can't even go out of the house. He's shooting speed. He's taking cylert [sic]. . . . Four months later, he kills a policeman.

33 SR 431. On cross-examination, Dr. Psikoff testified that he thinks Powell "was quite crazy in 1978" and that at the time he killed Officer Ablanedo "he was insane on the drugs that he had taken." 33 SR 458-59. At this time, the state asked Dr. Psikoff whether he had read Dr. Richard Coon's testimony from the prior trial and his report made after examining Powell, to which Dr. Psikoff responded he had. 33 SR 460. Dr. Psikoff disagreed with Dr. Coon's conclusion that Powell was legally sane at the time of the murder. 33 SR 461. When asked if Powell was insane and unable to conform his conduct to the requirements of the law on May 18, 1978, Dr. Psikoff testified as follows:

> You have to be very careful when you say that because I know that, as a consequence of Dr. Luker's treatment and David's administration, that he was insane. But I'm not telling you that David wasn't a party to the administration of those drugs. I'm not telling you that he was insane simply because somebody else came along.
>
> I'm telling you that David was already a drug user when he went to Dr. Luker, and that when he was finished with that treatment, he was truly insane. When he killed policeman [sic], yes, he was insane. He was insane as a result of the drugs he was on. That is correct.

33 SR 495. Dr. Psikoff stated that he knew the difference between the defense of insanity at the guilt-innocence phase and the use of voluntary intoxication as a mitigating circumstance at

punishment, and testified that he felt Powell's evidence of insanity fell into the latter category. 33 SR 496. However, he maintained that Powell's voluntary intoxication had rendered him insane at the time of the murder. 33 SR 496. Dr. Psikoff testified that he did not think the reason Powell so heavily armed himself had anything to do with his desire to protect his drug business. 33 SR 514. He stated that he thought "David was quite psychotic when he killed a policeman[,]" that Powell thought World War III was approaching and that there would be a fascist invasion for which he had to prepare. 33 SR 514-15, 519, 523. Finally, Dr. Psikoff testified that *Powell had admitted to him that he killed Officer Ablanedo.*

Dr. James Marquartz testified that it is impossible for psychiatrists to make any sort of accurate long-term prediction regarding a person's future dangerousness. 34 SR 595.

Finally, Powell's mother testified that Powell was a very good student and was "a delight" as a child. 34 SR 630. However, Powell changed once he went off to college and "took on a lot of radical thinking." 34 SR 633. Nevertheless, Powell's mother was shocked to find out Powell had shot a police officer and thought the police must have the wrong person. 34 SR 641. She testified that Powell is a very caring and sweet person and would not commit future acts of violence. 34 SR 652.

State's Rebuttal

Bruce Hobbs, the owner of an auto parts store and service center that had done some work on Powell's car, testified that Powell's check to him bounced. 34 SR 672. Hobbs eventually found out where Powell lived and attempted to retrieve the car. When Powell came to the front door he was holding by a collar a "pretty mean-looking dog" that was trying to lunge at Hobbs. 34 SR 675. When Hobbs said he intended to take the car, Powell said, "Well, I wouldn't do that if I were you." 34 SR 675. Hobbs pulled a gun and held it on Powell and the dog until a friend of his arrived and took the car. 34 SR 675-77. As Hobbs walked toward his own truck, "the door opened and here came the dog." 34 SR 677. Hobbs made it

safely into the truck and threatened Powell he had better get the dog away from the truck, which Powell did. 34 SR 677. Hobbs did not know if Powell deliberately released the dog or whether it was an accident. 34 SR 677.

Steve Edwards, a former assistant district attorney for Travis County, testified that at a prior hearing regarding Powell, Powell kicked a security guard when the guard pulled him away from the railing where Powell was attempting to lean over and speak with or kiss a family member. 34 SR 688.

George Haywood, a transportation officer with the Travis County Sheriff's Office, testified about an incident where Powell was angry that he was not given some requested eyedrops and cursed at Haywood. 34 SR 699-701.

Lee Ramos, the maintenance man who worked for one of Powell's former landlords, testified that he found Powell attempting to break into a storage room to retrieve his property that had been stored there after his eviction. 34 SR 717-19. Ramos left to call the police, and Powell started following him with a knife. 34 SR 720. When Ramos stopped at a red light, Powell got out of the car he was in and attempted to approach Ramos, but Ramos jumped the curb and ran all the red lights until he got home. 34 SR 721-24. Powell went to Ramos' house, but Ramos' wife would not let Powell in the house. 34 SR 724. Powell told Ramos' wife that he did not mean to scare Ramos. 34 SR 736.

Wesley Wallace, the medical doctor working in the emergency room on May 18, 1978, testified that he found Powell to be of normal mental status with no abnormality. 34 SR 752.

Dr. James Grigson, a psychiatrist, testified on the basis of a hypothetical that Powell is a continuing threat to society and a very dangerous person. 34 SR 795. He also testified that drugs do not cause people to be involved in goal-directed, criminal-type activities. 34 SR 795. Dr. Grigson testified that Powell's medical records show he was diagnosed as recently as 1988 and 1989 as a sociopath.

Dr. Kenneth Timken, a psychiatrist who examined Powell several years before the murder, testified about the

results of his examinations. 34 SR 837-42. Dr. Timken testified that Powell did not reflect any guilt about a car theft charge and that he felt Powell represented a severe character neurosis. 34 SR 838-39. At that time, he felt Powell exhibited an evolving sociopathic personality. 34 SR 840, 842. Powell told the doctor he never felt guilt. 34 SR 840. On a following session, Dr. Timken noted a "highly narcissistic character disorder," meaning a person "who has little capacity for empathy with other people and who is centered in their own wishes and impulses without regard for other human beings". 34 SR 841. Dr. Timken testified he was not surprised to learn that Powell later murdered a police officer. 34 SR 842. Finally, Dr. Timken testified that drug use can accentuate certain kinds of behavior, but does not change the basic characterological makeup of the person. 34 SR 843.

Finally, the state called Dr. Richard Coons to the stand. 34 SR 850. On voir dire examination outside the presence of the jury, Dr. Coons testified that before he examined Powell, he gave Powell his *Miranda*[7] warnings and received clearance from Powell's attorney. 34 SR 850-51.[8] Dr. Coons further stated that he was not even going to broach the subject of Powell's future dangerousness and intended only to testify regarding Powell's sanity at the time of the murder. 34 SR 852. Back in the presence of the jury, Dr. Coons testified that Powell "did not have substances in his body at [the time of the murder] which rendered him unable the [sic] know that his conduct was wrong or unable to conform his conduct." 34 SR 862. Dr. Coons disagreed with Dr. Psikoff's conclusions that Powell thought World War III was coming and was under a drug psychosis. 34 SR 863. Dr. Coons then explained how Powell had related the events leading up to the murder:

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[7] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[8] Later, Dr. Coons again testified that Powell told him he did not want to discuss the offense until he cleared it with his lawyer, and that subsequently Powell did clear it with his lawyer and then spoke to the doctor about the offense. 34 SR 877.

He indicated to me that he was a speed dealer and that he had armament to protect himself from people taking money or drugs from him; that--he said that the gun that--the automatic weapon, he had it for months to a year; he had gotten it because he carried a lot of money. . . .

'It's a symbol of authority, and to keep rustlers and varmints off my tail.' He said, 'People would think you were crazy if you showed up and didn't have that kind of hardware.' And he indicated that his business consisted of--he had taught someone how to make methamphetamine. He was getting half a pound to a pound a week, and was selling it throughout Texas, and his income was in the seven, eight, ten thousand dollar a week range from the sale of methamphetamine.

. . . I asked him why he had the machine gun. He said that, 'It wasn't to be used for killing some young punk like that. It was for a declaration of the seriousness of intent,' and that, with regard to the offense, he indicated that he and Sheila Meinert were stopped, the officer then checked their identification, wrote her a ticket, let her go, and that--stopped them again. . . . Sheila jumped out of the car. He, as he had fantasized in the past--I asked him if he had ever thought that he might kill an officer at any time, and he indicated that his idea was that it might occur out on a country road.

He said, 'I always envisioned it happening on a country road, and I had just gotten lost after shooting an officer.'

He indicated that when the officer was coming up to the car to address him, he said, 'I waited until the nth minute before I shot. I didn't want to shoot some jerk that was coming up to say happy motoring.'

> He indicated that the whole thing was to avoid being caught--that is, as to killing the officer--was to avoid being caught. It's senseless otherwise.
>
> ****
>
> He indicated that--he said, 'As the officer stopped us, it was a routine check. At the time I had about $10,000 worth of checks out.' And then, 'He gave my license back, and then he pulled us over again. I felt like everything I had been working for was going down the drain.'
>
> He said, 'There was dope in the trunk and a package with a pistol. . . .'
>
> . . . . [H]e indicated that the specific reason that he shot the officer was to avoid being arrested, that -- he said, 'I would have been in almost as much trouble if I had been arrested.'

34 SR 863-66. Dr. Coons testified that Powell did not act remorseful at all.[9] Powell talked about how "I killed a cop and I'm sort of a folk hero[.]" 34 SR 866.

Defense Rebuttal

Dr. Marquartz testified that he had done a study on people that Dr. Grigson had testified against in capital murder cases and that his predictions were inaccurate. 34 SR 885-86.

Dr. Richard Wall testified similarly regarding Dr. Grigson's predictions. 34 SR 888-91.

Dr. Psikoff testified that as of 1990 or 1991, Powell has no antisocial personality problems. 34 SR 895. He further testified that in his earlier testimony he did not intend to imply that he thought the defense of legal insanity had been raised in the case, and that "I am not saying that he was insane[.]" 34 SR 896-97. Psikoff admitted that Powell had told him he shot the

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[9] On cross-examination Dr. Coons acknowledged that he had previously testified that Powell did show some remorse, but stated he was having trouble remembering and was a little surprised he had testified that way. 34 SR 87.

officer and had drugs in the car and did not want to be arrested. 34 SR 897. He stated that Powell certainly knew the man was a police officer. 34 SR 898. On cross-examination, Psikoff stated that he had never said Powell was insane at the time of the offense and that if he had stated Powell did not know his conduct was wrong when he shot Officer Ablanedo he had misspoken because "he was certainly sane at the time." 34 SR 914-15. He further stated that Powell killed the policeman because he did not want to go to jail. 34 SR 915.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Powell advances no special or important reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II.

POWELL'S ARGUMENT SUPPORTING HIS CLAIM THAT HE IS CONSTITUTIONALLY ENTITLED TO A NEW TRIAL WAS NOT PRESENTED TO THE COURT BELOW AND IS NOT A PROPER SUBJECT OF CERTIORARI REVIEW.

In the court below, Powell requested that his entire conviction be reversed, but he never asserted the alleged constitutional basis that he now asserts entitles him to a new trial

on guilt-innocence. In the instant petition, Powell asserts he is constitutionally entitled to a reversal of his conviction as opposed to merely a reversal of his death sentence. While apparently conceding that the complained-of errors occurred solely during the punishment phase of his bifurcated trial and, therefore, after the jury's verdict of guilt, Powell now asserts that the trial court still had the power at the conclusion of the punishment proceedings to override the jury's guilty verdict, or at least to grant a new trial. *See* Petition at 8-9. He therefore contends that errors during the punishment phase of his trial could have led to his conviction because the trial judge *could* have been affected by the alleged errors and perhaps would have decided to override the jury's verdict of guilt *except* for the alleged errors. *Id.* Not only is this contention completely without merit, it was never presented to the Texas state courts and cannot be asserted for the first time in this Court as a basis for a reversal of Powell's conviction.

The cases are legion that this Court will not decide issues raised for the first time on petition for certiorari, and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n *Crowell v. Randall*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20 § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." *Cardinale*, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v.*

Estopinal, 251 U.S. 179, 181 (1919). Moreover, on direct review,

> [w]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'

Bd. of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 550 (1987), quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), quoting *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974), quoting *Street v. New York*, 394 U.S. 576, 582 (1969). Consequently, because the federal question raised in the instant petition for certiorari review was neither raised nor decided by the Court of Criminal Appeals, this Court cannot decide the issue.

III.

POWELL HAS NOT ASSERTED ANY CONSTITUTIONAL BASIS FOR WHICH HE IS ENTITLED TO A NEW TRIAL.

Powell asserts he is entitled to an entire new trial, as opposed to merely the resentencing the Court of Criminal Appeals ordered, because of certain alleged constitutional violations occurring during the punishment phase of trial. This claim is wholly without merit.

Initially, Powell incorrectly asserts that the Court of Criminal Appeals left "open" the question of whether Powell was to receive a new trial or merely a new punishment proceeding. This is incorrect. The court in its opinion clearly stated "We affirm appellant's conviction, but vacate and remand his sentence for further proceeding in accordance with Article 44.29(c)." *Powell*, 897 S.W.2d at 309. Article 44.29(c) requires that when error in a capital murder trial affects the punishment phase only, the court "shall not set aside the conviction but rather shall commence a new punishment hearing

as if a finding of guilt had been returned." Tex. Code Crim. Pro. Ann. art. 44.29(c) (Vernon Supp. 1995).[10] Accordingly, from the court's language, it is entirely clear that the court never intended to grant a new trial to Powell on the basis of the errors found.

Second, as shown above, Powell asserts no basis for an entitlement to a new trial on guilt-innocence because the errors of which he complains occurred during the punishment phase proceedings, not during the guilt-innocence phase proceedings. The jury had already found Powell guilty of capital murder and handed down its verdict before it considered any punishment phase evidence. As stated, in order to sidestep this obvious hurdle to his request for a new trial, Powell asserts that the trial judge "retained the power to make rulings affecting guilt as well as punishment" until after the punishment phase of trial and that, therefore, the alleged problems arising in punishment could have affected the court's judgment on the verdict of guilt against Powell. Of course, Powell asserts absolutely no basis in Texas law by which a trial court could accept the jury's verdict of guilt, proceed to the punishment phase of trial, and then override the jury's verdict of guilt and order an acquittal at the conclusion of the punishment phase proceedings. Moreover, even assuming

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[10] Conceding that this is an inappropriate time, procedurally, to lodge such a complaint, Powell nevertheless suggests that there may be some constitutional infirmity with article 44.29(c) because it allows for resentencing as opposed to a new trial on guilt-innocence when error occurs only in the punishment phase of trial. He asserts that the jury's initial finding of guilt does not result in a judgment being entered, and that a final judgment is not rendered until after the punishment phase proceedings, apparently implying that the trial court renders only one final judgment that applies to both of the jury's findings and that this judgment cannot be reversed only in part as to sentencing. Of course, this Court has repeatedly vacated a petitioner's death sentence and remanded for resentencing when the complained-of error affected only the punishment decision. *See, e.g., McKoy v. North Carolina*, 494 U.S. 433, 435 (1990); *Skipper v. South Carolina*, 476 U.S. 1, 8-9 (1986); *Cabana v. Bullock*, 474 U.S. 376, 392 (1986); *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Powell demonstrates no basis upon which to conclude that these decisions were unconstitutional or that the Court's decision in such cases is flawed.

such a procedure was possible, the court clearly indicated it would not be willing to do so in the instant case by refusing to grant Powell's motion for instructed verdict made *after* the guilt-innocence phase evidence had been submitted and *before the punishment phase proceedings began*. 30 SR 1096. The court clearly did not believe the evidence insufficient to convict Powell even before the punishment phase. Thus, Powell's suggestion that the court may have been inclined to order an acquittal except for alleged errors occurring during punishment is belied by the court's denial of Powell's motion for instructed verdict even before the punishment phase began.

Finally, even if Powell could conceivably demonstrate that the trial court was capable of overriding the jury's guilty verdict *after* the punishment phase proceedings, and that the court was inclined to do so *except* for the alleged errors occurring at punishment, he has failed to demonstrate any constitutional error at punishment.

A. The State did not repeat the constitutional violation condemned in Powell's first capital murder trial.

Powell first complains that the state violated his Fifth and Sixth Amendment rights by introducing Dr. Coon's testimony at the punishment phase of trial. He bases his argument primarily on this Court's holding in *Powell v. Texas*, 492 U.S. 680 (1989), in which the Court concluded that Fifth and Sixth Amendment violations occurred during the punishment phase of Powell's first trial. The problem with Powell's analysis, of course, is that simply because the same doctor testified at the punishment phase of both trials, and his testimony was found unconstitutional in the first case, does not make his substantially different testimony at the second trial unconstitutional.

1. No Sixth Amendment Violation Occurred.

It is clear that a capital defendant is entitled to "the assistance of his attorney[] in making the significant decision of

whether to submit to [a psychiatric] examination and to what end the psychiatrist's findings [can] be employed." *Estelle v. Smith*, 451 U.S. 454, 471 (1981); *see Satterwhite v. Texas*, 486 U.S. 249, 254 (1988).

Here, as demonstrated in the statement of facts, *supra*, Dr. Coons testified that he received clearance from Powell's attorneys to examine Powell. 34 SR 851. He stated that at the previous trial Powell's attorneys asserted they were not aware that his examination would encompass future dangerousness and that he nevertheless testified to Powell's future dangerousness at that trial. 34 SR 851. Dr. Coons stated that he would not broach the subject of Powell's future dangerousness in this trial and intended to testify only as to his sanity at the time of the murder. 34 SR 852. Powell's attorney then objected on the basis, among other things, that Dr. Coons was not allowed to testify at all at the punishment phase of trial under this Court's opinion in *Powell v. Texas*, 492 U.S. 680 (1989). However, counsel neither asserted nor objected that Powell's original attorneys were unaware that the examination would encompass the issue of Powell's sanity at the time of the offense.[11] 34 SR 855-58. Later, Dr. Coons again testified that the first time he examined Powell it was only for approximately fifteen or twenty minutes and that Powell told him he did not want "to discuss the offense until he cleared it with his lawyer, . . . He had talked with a lawyer already, but that he--he indicated that he was willing to talk with me, but wanted to be sure he cleared it with his attorney before he talked about the offense." 34 SR 876-77. After Powell cleared it with his lawyer, Dr. Coons examined him subsequently at which time Powell discussed "his thinking and his behavior as regards the offense." 34 SR 877.

Thereafter, as he stated he would, Dr. Coons did not testify as to Powell's future dangerousness but rather merely rebutted the testimony of Powell's expert that Powell was insane when he committed the murder and thought World War III was

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[11] Indeed, as this Court noted in *Powell v. Texas*, 492 U.S. at 681, the court order at issue specifically ordered Dr. Coons to examine Powell as to his competency to stand trial and sanity at the time of the offense.

coming. 33 SR 431, 458-59, 495-96, 514-15, 519, 523; 34 SR 862-66.

On the basis of these facts, it is clear that no Sixth Amendment violation occurred in Powell's retrial. As this Court noted in *Buchanan v. Kentucky*, 483 U.S. 402, 424 (1987), the proper focus for purposes of the Sixth Amendment is not on how the psychological evidence is used but, rather, whether the defendant was able to consult with counsel regarding the scope and nature of the examination. *Id.* There is no dispute here that Powell had such a consultation and then agreed to Dr. Coon's examination.[12] Thus, the protections at which the Sixth Amendment are aimed, that is, preventing a defendant from making significant decisions that could deny him a fair trial by assuring the assistance of counsel at critical stages in the proceedings, were not abridged in the instant case. Here, Powell clearly had "the guiding hand of counsel" in making the important decision of whether to submit to Dr. Coon's

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[12] Powell's reliance on this Court's decision in the direct appeal of his first trial is unconvincing. As demonstrated above, the facts surrounding the use of Dr. Coon's testimony differs dramatically between the two trials. When Dr. Coons testified at Powell's first trial, he testified as to Powell's future dangerousness, an issue that Powell's attorneys asserted they were wholly unaware the examination would encompass. Here, Dr. Coons testified solely as to the issue of Powell's sanity at the time of the offense, one of the precise issues for which the examination was ordered. Powell has never complained, and does not complain here, that his attorneys were unaware that the examination would include the sanity issue. To the extent he attempts to assert that he was unaware the examination could be used for purposes of punishment, this argument is unavailing. A defendant's sanity at the time of a murder is highly relevant at both the guilt-innocence and punishment phases of his capital murder trial. At guilt-innocence, such evidence can be used as an affirmative defense by the defendant; at the punishment phase, such evidence can be used in mitigation of punishment. Thus, defense counsel's knowledge that the examination would include a sanity determination is the relevant inquiry; any competent defense counsel would know how such evidence could thereafter be used, and rebutted, at a capital murder trial. Accordingly, Powell's two trials are entirely different for purposes of Sixth Amendment analysis.

examination. *Powell*, 492 U.S. at 681. Accordingly, Powell's claim must fail.

2. No Fifth Amendment Violation Occurred.

Next, Powell relies on *Tague v. Louisiana*, 444 U.S. 469 (1980), and asserts that his Fifth Amendment rights were violated by Dr. Coon's testimony because there is insufficient evidence that the *Miranda* warnings given by Dr. Coons to Powell before his examination were sufficiently understood and/or waived by Powell.

Initially, it is clear from the record that Powell knowingly and intelligently waived his Fifth Amendment rights. It is true that statements by a defendant are inadmissible at trial when there is "no evidence at all" that the defendant knowingly and intelligently waived his rights before making the inculpatory statement. *Id.* at 471. However, a waiver of *Miranda* rights "need not be explicit but may be inferred from the actions and words of a person interrogated . . . ." *Id.*

In the instant case, the record reflects that Dr. Coons administered Powell his *Miranda* warnings and that Powell at first declined to answer any questions regarding the offense until he had cleared it with his lawyer. 34 SR 851, 876-77. Powell did indicate, however, that he knew his legal status, that he had been given his rights by the policeman and the Judge, and that he was charged with capital murder for killing a policeman. 34 SR 876. After consulting with his lawyer, Powell discussed the offense and his thinking and behavior at the time of the offense. 34 SR 877.[13] Here, Powell's actions in refusing to discuss the offense without clearance from his lawyer demonstrates that he fully understood Dr. Coon's *Miranda* warnings, initially invoked

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[13] Furthermore, it should be noted that Powell is extremely intelligent, scoring a near perfect score on the SAT college entrance exams, and cited as having an IQ of 145. 32 SR 338; State's Exhibit 384 at "Neuropsychiatric Evaluation" dated 2-21-88 and "Texas Department of Corrections Social History" dated 4-26-88; see also State's Exhibit 384 at Psychiatric Evaluation dated May 4, 1979. It is highly unrealistic to argue that he would not understand the import of the *Miranda* warnings.

them to some extent, and then voluntarily waived them. There is ample evidence in the instant case that Powell knowingly and intelligently waived his Fifth Amendment rights. Accordingly, this case is distinguishable from the facts in *Tague*.

Even assuming the record was insufficient to demonstrate Powell knowingly waived his Fifth Amendment rights, Powell *has* waived any right to complain of the alleged Fifth Amendment violation because he interjected the issue of temporary insanity into the trial during the punishment phase. In *Estelle v. Smith*, this Court held that Fifth Amendment concerns apply to the punishment phase of a capital murder trial to prohibit the state's affirmative use of unwarned statements by the defendant to a psychiatrist. 451 U.S. at 466. The Court concluded in that case that when the court-appointed psychiatrist testified for the prosecution at the penalty phase regarding the defendant's future dangerousness, his role changed "and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id.* at 467. Accordingly, the defendant's statements "could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them." *Id.* at 469.

However, the Court further noted that a defendant could waive his Fifth Amendment rights:

> When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist.

Id. at 465 (citations omitted). The Court then noted that, on the same theory, the Court of Appeals in that case had left open the possibility that a defendant who wishes to use psychiatric evidence in his own behalf on the issue of future dangerousness can be precluded from using it unless he is also willing to be

examined by a state psychiatrist. *Id.* at 466 n. 10. The Court later referred back to footnote ten by concluding:

> Our holding based on the Fifth and Sixth Amendments will not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute. A defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty. In addition, a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase. *See* n. 10, *supra*.

Id. at 472.

Later, in *Buchanan v. Kentucky*, the Court held that the state's use of a psychiatric report to rebut a petitioner's psychological evidence introduced at trial to establish the affirmative defense of "extreme emotional disturbance" did not violate his Fifth Amendment rights. 483 U.S. at 423. The Court noted that "with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence." *Id.* Finally, in *Powell*, 492 U.S. at 683-85, the Court noted that

> it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony, . . . Thus, if a defendant were to surprise the prosecution on the eve of trial by raising an insanity defense to be supported by psychiatric testimony, the court might be justified in ordering a continuance and directing that the defendant submit to examination by a state-appointed psychiatrist.

None of these cases limit the state's right to rebut a defendant's psychological evidence to the guilt-innocence phase of trial. Indeed, the Court's statements in *Estelle* suggest just the opposite: that is, the state should be allowed to rebut a defendant's psychological evidence used at the punishment phase of trial with psychological evidence of its own just as it would be

entitled to do at the guilt-innocence phase of trial. *Estelle*, 451 U.S. at 472 & 466 n. 10. Moreover, the reasoning behind finding a waiver of the defendant's Fifth Amendment rights at the guilt-innocence phase of trial is the same at the punishment phase.

> 'Once a defendant decides to testify, (t)he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'. . . By introducing psychiatric testimony obtained by the defense from a psychiatric examination of the defendant, the defense constructively puts the defendant himself on the stand and therefore the defendant is subject to psychiatric examination by the State in the same manner.

Battie v. Estelle, 655 F.2d 692, 702 n. 22 (5th Cir. 1981) (citations omitted).[14]

Applying the Court's analysis in the foregoing cases to the instant case, it is clear that Powell's Fifth Amendment challenge to Dr. Coon's testimony cannot stand. Here, Powell's own expert, Dr. Psikoff, raised the temporary insanity issue at the punishment phase of trial. 33 SR 431, 458-59, 495-96, 514-

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[14] This Court noted in *Powell* that its earlier decisions in *Estelle* and *Buchanan* provided support for the Fifth Circuit's holding in *Battie* regarding the Fifth Amendment waiver. *Powell*, 492 U.S. at 684.

15, 519, 523.[15] Dr. Coons merely rebutted this testimony with his own testimony that Powell was sane at the time of the murder. 34 SR 862-66. Thus, Powell had waived any Fifth Amendment right not to have Dr. Coons use his statements against him by injecting the issue of his temporary insanity into the trial. Powell should not be allowed to hide behind the Fifth Amendment in order to enable him to introduce self-serving statements that he was insane at the time of the murder and at the same time prohibit the state from rebutting such evidence. If Powell himself had testified during punishment that he was insane at the time of the murder, he clearly would have been subject to cross-examination regarding his prior statements indicating just the opposite. Powell's use of Dr. Psikoff to present the exact same type of evidence should not allow Powell to bypass the state's right to rebut such evidence. Accordingly, Powell has waived his right to complain of any Fifth Amendment violation.

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[15] The fact that defense counsel requested to have the temporary insanity instructions removed from the punishment phase charge is not determinative of this issue. Dr. Psikoff repeatedly testified to Powell's temporary insanity due to voluntary intoxication. 33 SR 431, 458-59, 495-96, 514-15, 519, 523. If this testimony had remained unrebutted, defense counsel undoubtedly would have left the temporary insanity instructions in place. However, during defense rebuttal, Dr. Psikoff admitted that Powell had told him he shot the officer, had drugs in the car, and did not want to be arrested, 34 SR 897; that Powell certainly knew the man was a police officer, 34 SR 898; that Powell "was certainly sane at the time[,]" 34 SR 914-15; and that Powell killed the policeman because he did not want to go to jail. 34 SR 915. In light of this testimony from Powell's own expert, a temporary insanity instruction was useless to the defense and could only serve to support the state's argument that Powell had interjected the temporary insanity issue into the trial. The defense thereafter moved to abandon the temporary insanity instruction from the court's punishment phase charge. 35 SR 973.

B. The presence of a large number of uniformed officers in the courtroom during the final arguments at the punishment phase of Powell's trial does not entitle him to a new trial.

Powell next complains that during the final arguments at the punishment phase of his trial, the courtroom was filled with uniformed police officers wearing purple strips of tape over their badges as a sign of mourning for Officer Ablanedo.

The problem, again, with Powell's argument is that, even assuming all the facts as he states them,[16] he has already received all the relief to which he is entitled by the Court of Criminal Appeals' remand for resentencing. There is no conceivable way that heavy police presence during the punishment phase proceedings could have affected the jury's previous guilty verdict in the guilt-innocence phase proceedings.

Secondly, Powell's counsel never objected at trial to the alleged "intimidating" atmosphere created by the large number of police officers in the courtroom. Despite Powell's assertions that the "demonstration" was "behind counsel's back," petition at 11, the record clearly demonstrates that counsel was aware of the large number of police officers the entire time and never

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[16] However, the state does not agree with Powell's recitation of the facts. There was absolutely no competent evidence introduced at the hearing on the motion for new trial that the presence of the police officers was planned or "orchestrated". Defense witness David Van Os, a friend of Powell's, speculated that "it seems as if" the officers were dispatched to the courtroom because they all showed up at the same time. 36 SR 6-9. Defense counsel himself testified that he heard from a lady that works at the television station that there had been a dispatch for the officers to there. 36 SR 20. A hearsay objection to this testimony was immediately sustained. 36 SR 20. No attempt was made to provide the court with any direct evidence that police were dispatched to the courtroom, *e.g.*, testimony from the lady, police dispatch records, etc. On the other hand, the prosecutor testified under oath that he was unaware of any dispatch being made for the police officers to attend closing arguments. 36 SR 12. He further testified that he did not send for the police officers, nor personally requested any of them to be there to influence the jury. 36 SR 13.

objected. Indeed, counsel acknowledged as much during his final argument:

> I don't know whether it's coincidence that there are a lot of people in the courtroom today, and I'm not going to argue that there are a lot of police officers here in the courtroom, and that's supposed to influence you in some way. My mother is here. I hope she doesn't intimidate you.

35 SR 1015.

Furthermore, it was brought out at the motion for new trial that the officers arrived in the courtroom before the jury was brought in for final arguments. 36 SR 16, 21, 24, 45. Defense counsel was fully aware of their presence yet never made a record objection either before or after the jury was brought in. 36 SR 13, 16, 24. Further, it is unconvincing to argue that defense counsel as experienced as Mr. DeGuerin would forget or overlook the need to object to a "lynch-mob atmosphere." The fact that he chose not to object supports the notion that the atmosphere was not, in fact, so intimidating as to affect the jury's deliberations.

Furthermore, Powell cites no cases in which this Court has held that the voluntary presence of a large number of police officers, at the punishment phase of a capital murder trial in which the victim was a fellow police officer, violates a defendant's right to a fair trial. *Turner v. Louisiana*, 379 U.S. 466 (1965), *Irvin v. Dowd*, 366 U.S. 717 (1961), *Sheppard v. Maxwell*, 384 U.S. 333 (1966) and *Moore v. Dempsey*, 261 U.S. 86 (1923) are all distinguishable on their facts.

Finally, any suggestion by Powell that this alleged error could have affected the trial court's decision to render judgment on the jury's guilty verdict is absurd. As demonstrated above, such procedures are not even possible under Texas law. Furthermore, the trial court was given an opportunity to direct a verdict for Powell at the conclusion of the guilt-innocence phase evidence and prior to the punishment phase proceedings, and promptly declined to do so. 30 SR 1096. Finally, even if the alleged Fifth and Sixth Amendment errors previously discussed

could have impacted the trial court's view of the evidence relating to Powell's guilt or innocence, which the state strongly denies, it is inconceivable to argue that the courtroom presence of a large number of police officers at the punishment phase of a trial could persuade a court that the defendant it thought was innocent was actually guilty. This claim is frivolous.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

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